THE FUNDAMENTAL RIGHTS OF MAN

IN THEORY AND PRACTICE

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CHAPTER I

Introductory

During the discussions on Indian Constitutional Reforms that took place first at the various sessions of the Round Table Conference and later on in the British Parliament and before the Joint Parliamentary Committee the subject of the Fundamental Rights of Man occupied an important place. A demand for including in the new constitution a section dealing with these rights was made from several quarters. The demand was put forward not only by radical organizations like the National Trade Union Federation but also by conservative and even reactionary bodies like Landholders' Associations. Communal organizations like the Muslim League and the Hindu Mahasabha urged it with as much fervour as the representatives of nationalistic organizations. The demand was considered by the Parliament and the Joint Parliamentary Committee and finally rejected. All the same there are several people in the country today who think that the demand should have been conceded and who feel that in any future constitution of India a list of the fundamental rights of man should be incorporated. According to them it will not only serve a general purpose but also be at least a partial solution of the Indian Communal problem, the one problem for which no satisfactory solution agreeable to all the parties concerned has been found. It is therefore worth while examining the whole subject and estimating its value from a theoretical as well as from a practical standpoint.

For like most political doctrines, the Doctrine of the Fundamental Rights of Man has both a theoretical and a practical aspect. As a theory it lays down the principles which ought to characterize a good and just system of government. At the same time it suggests the kind and nature of the constitutional arrangements that have to be devised if its ideal of good government is to become actual.

The doctrine holds that a system of government is good if it is based on the principle that man has certain rights independently of the government under which he lives and that his government should do nothing by way of interfering with these rights. It also holds that it is possible to formulate a fairly complete list of such rights. Among the constitutional arrangements that it advocates

is the incorporation of these rights in a written constitution not subject to amendment or modification by the usual organs of government, and the setting up of a special agency like a supreme court of justice to see that these rights are not infringed by any of the governmental bodies—the legislature or the executive.

The doctrine was a product of the age of revolution in the history of Europe and North America—the age which witnessed the British, the American and the French Revolutions. All these revolutions had one characteristic in common. They were all of them protests against the then prevailing systems of government. They found them to be bad and substituted for them what the revolutionaries considered to be good systems. The central point of difference between the governmental systems overthrown and those set up in their stead was that in the former there was no place for fundamental rights while in the latter they occupied the central place and formed in fact their basic foundation.

Under the systems overthrown in consequence of these revolutions rulers alone were regarded as having rights while the subjects over whom they ruled had only duties and obligations. Even where subjects were conceded to have rights it was not all of them that were permitted to possess them but only those who belonged to the higher ranks of society—the nobility and the clergy. The rights which these superior classes enjoyed were not so much the rights of men as men but the rights of particular orders or groups. They were more in the nature of privileges. The vast majority of the people in every country—the merchants, and the common men and women—had only duties towards their rulers and towards the privileged classes. It was in this atmosphere that the doctrine of fundamental rights had its origin and growth. It declared that subjects also had rights and that they had them not because they belonged to this or that order of society but solely by virtue of the humanity in them. They were the rights of men as men and not those of noblemen, clergymen or working men. The protagonists of the doctrine even went to the extreme of stating that governments—that is, persons in political authority—had no rights at all but only duties. The doctrine of the rights of man was thus the counterpart of the doctrine of the rights of rulers.

CHAPTER II

The Origin of the Doctrine

The circumstances that led to the formulation of the doctrine can be understood only in the light of the history of Europe in the sixteenth, seventeenth and eighteenth centuries. By the beginning of the sixteenth century almost every country in Europe was governed by absolute monarchs. Political power which throughout the middle ages was dispersed among the feudal nobility, the town councils and guilds, and the Church, now came to be concentrated in the hands of kings. The restraints imposed on them by custom and by the rights claimed by the nobility, the clergy and the townsmen disappeared in most countries. The rising middle class which in the revolutionary age became the most active and the most effective opponent of absolutism was in the sixteenth century its devoted and loyal ally. Businessmen and capitalists who were having just then new and wider opportunities of making money and to whom security and peace were more valuable than anything else, found in the despotism of the monarchs the only safe-guard against the disorders created by the feudal nobility to whom private warfare was a pastime. The business class also equally welcomed the national regulation of trade by the new monarchs in place of local regulation by town councils. This facilitated the growth of commerce within the country. By destroying the power of the Church and confiscating in many cases the property that belonged to it the monarchs liberated business enterprise from the restrictions formerly imposed on it in the name of religion, and mobilized much of the wealth that was hitherto lying idle. They also utilized their strength in protecting external trade from the attacks of pirates and in negotiating favourable commercial treaties with governments abroad. In these and several other ways they helped the growing middle class to become richer and more prosperous. This explains the alliance between the new despotism and the new middle class during the sixteenth century.

But there came a time when the middle class began to feel that the price they were called upon by kings to pay for the peace and security given to them was too high. It was true that the absolute monarchs freed them from the tyranny and oppression of the feudal nobility and the Church. A new tyranny, however—the tyranny of the

new rulers—took the place of the old one; and it did not matter much to them whether the tyranny from which they suffered was that of noblemen and clergymen or that of their monarchs. These monarchs began to use their authority and strength primarily to increase their own power and to further their personal and dynastic interests. The promotion of the welfare and the happiness of the middle class or of their other subjects became to them in course of time a matter of secondary and subsidiary importance. Thus arose a bitter conflict between the politics of power and the politics of welfare. The doctrine of the Fundamental Rights of Princes stood for the former, while the emerging doctrine of the Fundamental Rights of Man stood for the latter.

The religious factor complicated the whole situation. The Reformation of the sixteenth century created a religious schism among the peoples of Europe. It brought to the forefront the question of the relation that should exist between a monarch and his subjects when they differed from one another in matters religious. Such subjects regarded their ruler as a heretic while he in his turn regarded them equally as heretics. In those days heresy was not merely a sin but also a crime punishable by the law of the land. The idea of toleration was foreign to the thought as well as to the practice of the age. Every ruler regarded it as his duty to spread among his subjects the true faith, which meant the faith professed by him. He felt it derogatory to his claims for absolute and unlimited power that there should be any among his subjects denying his authority or the authority of his Church. Persecution in the name of religion became the rule. Those who did not conform to the faith of their monarchs were prohibited from performing their worship in public. They were denied civil rights. Cruel imprisonment, exile to distant countries, confiscation of property, torture, and death fell to their lot. The sufferings of the Dutch at the hands of Philip II of Spain, of the Irish at the hands of the English and of the Huguenots at the hands of Louis XIV of France are only a few of the outstanding examples of religious persecution. Many countries passed through an era of terrible wars of religion resulting in complete devastation of towns and villages. It took a long period of time for rulers and subjects to learn that the division of Christianity into numerous sects was irreparable, that no single sect could

either coerce or convince others, that persecution was ruinous to property and endangered the conditions of sound and successful business enterprise, that the best thing would be to tolerate religious differences, and that politics should be divorced from religion.

Absolute monarchs used their power not only to control the religious opinions and practices of their subjects but also to oppress them in a number of other ways. They made taxation increasingly burdensome. They collected forced loans. They sold monopoly rights to their favourites. They used the revenues thus obtained in leading lives of wasteful luxury, in maintaining on an extravagant scale their courts and courtiers and in carrying on aggressive dynastic wars. All classes of people and especially the middle class to whom property was everything, were adversely affected by such financial policy. Every tax meant the taking away of a portion of a man's private property by the force at the command of government. It was in this atmosphere that the revolutionary doctrine of the Fundamental Right of Man to his property had its birth, involving the corollary that he should not be deprived of it without his consent, not merely by other men but also by his government. For as Locke says: 'A man's property is not at all secure, though there be good and equitable laws to set the bounds of it between him and his fellow subjects, if he who commands those subjects have power to take from any private man what part he pleases of his property, and use and dispose of it as he thinks good—if any one shall claim (as all absolute rulers claimed in those days) a power to lay and levy taxes on the people by his own authority, and without such consent of the people, he thereby invades the fundamental law of property, and subverts the end of government. For what property have I in that which another may by right take when he pleases to himself?'

In the age of absolutism 'Law' meant the expression of the personal will of the monarch, however arbitrary, impulsive and irrational that will might be. 'The thing is legal because I wish it,' said Louis XIV of France. It was on the basis of this maxim that almost all European governments were carried on. Very few monarchs were enlightened. The large majority of them brought untold suffering on their subjects by the unwise laws they enacted and by the severe and cruel punishments they inflicted

experience of his he drew the inference that the establishment of power armed with undisputed and absolute authority—and it did not matter whether this authority was in a king or in an assembly though personally he preferred the former—was the only constitutional arrangement under which men could enjoy the security which was their primary and fundamental need. Man's one chance of peace is to agree unconditionally to obey a government and not question its right to command. In his view all rights belong to governments; subjects have only duties. The moment any subject claims a right independently of his government and begins to dispute its authority he creates conditions of disorder and insecurity which are fatal to peace and happiness. Political unity and security are goods which are of the greatest value to man. Liberty and property are nothing when compared to these; and these can be had only when government is armed with unlimited and absolute power. This is the logic behind the defence of absolutism by Machiavelli and Hobbes; and they are bound to have supporters in those times and those countries where people value unity and security above liberty.

One characteristic feature of the age of absolutism was the hierarchical organization of society. There was a rigid distinction between the privileged and the unprivileged classes and the principle of inequality reigned supreme. The two privileged classes of the nobility and the clergy enjoyed numerous advantages without rendering any corresponding services to society. Though they were the wealthiest classes in the community they were exempt wholly or partially from many of the taxes levied by government. This exemption made the taxes weigh heavily on the middle classes who carried on industry and commerce and on the common people consisting of peasants, artisans and working men. Though a small minority in point of numbers, the privileged classes owned a large proportion of the land and exacted from the actual cultivators, who in many countries were serfs, a variety of payments and services of a most burdensome character. The Church exacted payments known as tithes from them. It therefore fell to the lot of the common folk merely to work while all the good things of life produced by their hard work were enjoyed by the superior folk. In addition to all this the highly lucrative positions in the Church, the navy, the army and

the diplomatic service were monopolized by the sons of the nobility. Noblemen and clergymen were in many cases in receipt of pensions and largesses from the royal treasury. Resentment at this inequality was felt most by the *bourgeoisie* and the upper middle class—the class of merchants, bankers, manufacturers, lawyers, physicians, teachers and literary men. Many of those who made fortunes in commerce and who were highly intelligent, educated and energetic, became thoroughly dissatisfied with a system under which they were treated as social inferiors and refused admission into the governing class. They hated and envied and felt morally superior to their aristocracies. It was they that were most vocal in claiming the fundamental right to equality.

Rousseau the prophet of the French Revolution looked at equality from the point of view of the common man who suffered more than the middle classes from the hierarchical organization of society. To him the common man was the ideal man as moral virtues existed in him in the greatest purity. He said: 'It is the common people who compose the human race. What is not the people is hardly worth taking into account. Man is the same in all ranks; that being so, the ranks which are most numerous deserve most respect.'

In a sense the American Revolution has to be regarded as a revolt against inequality and privilege—the privilege claimed by the Englishmen living in England to regulate the life of Englishmen living in America. The Parliament in England in which the Americans were not and could not be represented asserted a right to tax the inhabitants in the colonies and to regulate their trade and industry; and when they showed signs of active opposition, it passed a number of coercive acts suspending in some cases the self-government enjoyed up till then by the colonies, placed them under military rule and deprived the colonials of some of the ordinary civil rights like trial by jury. The Americans bitterly resented this inequality and claimed in the early stages of their controversy with England not the right to independence but to equality of status with Englishmen. They were prepared to continue to own allegiance to the king in England if he agreed to rule the colonies with the advice of the colonial assemblies instead of with the advice of the English Parliament. It was the denial of this right to equality of status that drove the

Americans to the War of Independence. In their famous Declaration of Independence they proclaimed to the world that they had the right 'to assume, among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them.' The war they waged should therefore be regarded as a war against the principle of privilege and inequality which was a characteristic feature of the pre-revolutionary regimes.

Thus absolutism resting on an alleged God-given right to exercise unlimited sovereign power ultimately resulted in religious intolerance and persecution, the suppression of free thought and opinion, arbitrary restrictions on personal freedom and burdensome and inequitable taxation adversely affecting the property interests of subjects. Frustration, misery and suffering fell to the lot of the vast majority of the people in almost every country. The unity and order which monarchs created by the strength of their arms were felt to be a poor compensation for the manifold evils which despotism caused. It was in the process of the attempt to overthrow absolutism and demolish the theological and secular arguments put forward in its support that the doctrine of the Fundamental Rights of Man was formulated.

CHAPTER III

The Content of the Doctrine

Before examining the nature of the rights included in the formula it will be necessary to know what is meant by 'rights' in the present context. They may be looked at from what may be called a common sense point of view, and also from a philosophical standpoint. From the first point of view rights are merely remedies for wrongs experienced at the hands of despotic monarchs. Thinkers of the seventeenth and the eighteenth centuries entertained the idea that it was possible to discover a remedy for each of the wrongs resulting from despotism. To every such remedy which they thought they discovered, the name 'right' was given. There were therefore as many rights as there were wrongs to be remedied and their nature also

the means which an individual should have in enabling him to attain his purpose in life are his rights. Fundamental rights will then mean the rights which are essential and indispensible. They have to be possessed—man has no choice in the matter—if he is to lead a purposeful life. In the eighteenth century, philosophers thought that the attainment of happiness was the end to be achieved. It was felt that no man could achieve it unless he had secure possession of property, freedom of worship, liberty of thought and opinion, freedom of person and equal consideration at the hands of government. All these therefore became his fundamental rights. Today many philosophers think that the development of moral personality which implies the striving by each man to become the best which he is capable of becoming is the end to be pursued; and here again, whatever is necessary to realize this end becomes an item in the list of man's rights. This view of rights leads to the conclusion that no government is justified in exercising its power to interfere with man's rights, for that would result in preventing him from realizing the moral ideal which he places before himself. Absolutism which in essence is the exercise of unlimited power loses all its validity.

Rights which were regarded as fundamental were also described by the thinkers of the revolutionary age as sacred, natural, imprescriptible, and inalienable. Some of these attributes are made use of in the famous American Declaration of Independence and the French Declaration of the Rights of Man and of Citizens. Each one of these attributes has a significance of its own. As 'sacred' the rights are the gift of God; they do not owe their existence to governments or to human legislators. They are 'natural' in the sense of being inherent in human nature from the beginning and also in that of being the product of Reason (Nature and Reason are used more or less as synonyms by thinkers of the eighteenth century). They are imprescriptible in the sense of being valid in all ages and for all time. They are inalienable in the sense that man cannot part with them and still call himself a man. A conception of rights like this reverses the relation between rulers and subjects which was characteristic of the age of absolutism. Instead of rulers claiming all rights and throwing on their subjects all sorts of duties and obligations, it is the subjects that now come to possess

rights—claims that have to be accepted by governments—and rulers have only the duty of respecting these rights and abstaining from any course of action that might result in interfering with them. Despotism thus yields place to constitutionalism—which is government with only a limited authority—and this is the practical significance of the doctrine of fundamental rights.

Whatever view of the nature of rights is taken it is clear that there is a certain degree of flexibility about the doctrine itself and this is one of its supreme merits. When new wrongs are experienced new remedies and therefore new rights have to be automatically created. When some of the old wrongs disappear the need for the old rights also disappear along with them. This explains why the list of fundamental rights has had to undergo modification from time to time. Constitutions, for example, which were framed after the first World War contained many rights which did not find a place in those of the eighteenth and the nineteenth centuries. Even if rights are regarded as means for realizing the ideal purposes in life they are bound to vary from age to age, for ideals are not constant. As Laski has put it, 'Our natural rights will have a changing content simply because this is not a static world.' In any case the rigidity which some critics have attributed to the doctrine is a quality foreign to it.

In the list of fundamental rights the first place is justly given to the right of men to choose their rulers. This was in answer to the claim to rule by divine right set up by the monarchs of the age of absolutism and which was the root cause of their tyranny. It is not proposed to deal here with the arguments put forward in support of this fundamental right. The general idea, however, is that only a government which derives its just authority and powers from the consent of the governed will uphold the rights of the people and work for the promotion of their welfare and happiness. The French declaration of the rights of man referred to this right in the following words: 'The nation is essentially the source of all sovereignty; nor can any individual or any body of men, be entitled to any authority which is not expressly derived from it.' This view of the source of governmental authority is a decided advance on the Divine Right theory in so far as it means that government is merely a human contrivance, that it is after all an instrument fashioned by man to

satisfy some of his needs and that it can be refashioned by him in accordance with his changing requirements.

This idea of government being made and unmade by the governed was something novel to the subjects of absolute monarchs when it was first promulgated. But the happenings of the seventeenth and the eighteenth centuries made them familiar with it, so much so that it has subsequently come to be regarded as a commonplace truth. When King Charles I of England was first defeated in the battlefield and was later on executed, the victors among the people in the country were engaged in overthrowing one government and setting up another in its place. A similar thing happened when in the 'Glorious Revolution' of 1688 James II was deposed and William III and Mary were invited to become rulers. In 1776 each one of the thirteen English colonies in America overthrew the imperial rule of England and created new governments in its place. Eleven years later when they felt the need for a stronger and a more stable union they scrapped the Confederate Government which they had at first established and founded in its place a sound federal system. The National Assembly which met in France in 1789 and which issued the famous Declaration of the Rights of Man and of Citizens abolished the Divine Right monarchy of Louis XVI and established a constitutional republic in its place. Events like these put an end to the idea that rulers derived their authority from God and substituted in the day-to-day thinking of the people the idea that governments owe their existence and powers to men. Every revolution after 1789—and almost every country in Europe and America passed through one or more revolutions—confirmed the truth and the validity of the first of the fundamental rights. Today in every democracy the making and unmaking of governments by the people is a matter of ordinary occurrence. Every general election is an occasion for the exercise of this right. Those who are fighting now for the preservation and spread of democracy are actually fighting for the preservation and the spread of this fundamental right.

The right to hold rulers responsible for their conduct is the second of the fundamental rights. The French Declaration states that 'Every Community has a right to demand of all its agents an account of their conduct.' This was asserted as a reply to the dogma of absolute monarchs that their obligation to rule justly was an

obligation they owed only to God and that however bad a king might be he should not be judged by any human agency. The evils that arose in practice out of this dogma led to the enunciation of the principle that subjects have a right to criticize the actions of their rulers, hold them responsible for their actions and that if their actions failed to correspond with the will of the community they must be replaced by others.

It is in relation to this right that one can understand the full significance of another of the fundamental rights—the right of freedom of thought and opinion. In the words of the French Declaration, 'The unrestrained communication of thoughts and opinions being one of the most precious rights of man, every citizen may speak, write, and publish freely, provided he is responsible for the abuse of this liberty, in cases determined by the law.' The responsibility of the rulers to the ruled cannot become real and effective, unless the ruled are free to express their opinions on the way in which government is carried on. The thinkers of the eighteenth century attached high value to this right, not only because of the greater strictness with which the press was then controlled but also because even in countries which passed through revolutions and which established a representative system of government a large majority of the people were unenfranchised. While the enfranchised section could through the exercise of their vote replace one set of rulers by another the unenfranchised had no such opportunity. And if their interests had to be safe-guarded it could only be done by their having at least the right to freedom of expression so that they might expose the actions of government and bring pressure on it by shaping public opinion. Thus it may be said that while the value of this right is high to all sections of the community it is specially valuable to the unenfranchised. In countries that do not have a respresentative form of government at all a free press is the only effective means by which government can be prevented from becoming oppressive.

The right to resist rulers who indulge in misrule and oppression is another of the fundamental rights. This was in answer to the theory of passive obedience which was upheld by despotic rulers and their supporters. The case for the right of resistance and the answer to any objections that may be raised against it have been cogently stated by Locke the philosophic defender of the English

revolution of 1688. He says: 'The end of government is the good of mankind; and which is best for mankind, that the people should be always exposed to the boundless will of tyranny, or that the rulers should be sometimes liable to be opposed when they grow exorbitant in the use of their power, and employ it for the destruction, and not the preservation, of the properties of their people? Nor let any one say that mischief can arise from hence as often as it shall please a busy head or turbulent spirit to desire the alteration of the government. It is true such men may stir whenever they please, but it will be only to their just ruin and perdition. For till the mischief be grown general, and the ill-designs of the rulers become visible, or their attempts sensible to the greater part, the people, who are more disposed to suffer than right themselves by resistance, are not apt to stir. The examples of particular injustice or oppression of here and there an unfortunate man moves them not. But if they universally have a persuasion grounded upon manifest evidence that designs are carrying on against their liberties, and the general course and tendency of things cannot but give them strong suspicions of the evil intentions of their governors, who is to be blamed for it? Who can help it if they, who might avoid it, bring themselves into this suspicion?'

The fundamental right to bear arms is intimately connected with the right to resist oppression. Monarchs had their standing armies well-armed, drilled and disciplined. Although attempts were made in countries like England to prevent them from keeping such armies in time of peace they were not always successful, especially as wars tended to occur more and more frequently. Under these circumstances it was easy for despots to crush the resistance of an unarmed people. If the right to resist is not to be a mere right on paper and if it is to be effective it is necessary that every citizen should have the auxiliary right of bearing arms and being trained to use them. Like the right to freedom of speech this is a right of special value to the unenfranchised. How much value was attached to it can be best understood by what happened in the United States. The original constitution of the country was considered to be defective as it contained no section on fundamental rights. And when this defect was removed by the first ten amendments to the constitution, the second of these amendments laid down that 'a well-regulated

militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.' There is a similar clause in the English Bill of Rights though here the right is restricted to Protestants.

The right of every man to have a share in the making of laws is another of the fundamental rights. In the language of the French Declaration, 'The law is an expression of the will of the Community. All citizens have a right to concur, either personally or by their representatives, in its formation.' The recognition of this right ensures that laws will embody the whole of social experience and social needs and safe-guard the interests of each and every section of the people constituting the state. It serves as a powerful remedy against class legislation.

The group of rights that have been so far dealt with may be styled the political and public rights of man. They are concerned with the part that he is entitled to play in determining the general framework of government. It is the acceptance of the validity of these rights that has been responsible for the extension of the democratic system of government over a large part of the world in the nineteenth and the twentieth centuries. Distinguished from this group are what may be called the private or the civil rights of man. They are briefly: (1) the right to personal freedom; (2) the right to the freedom of religious belief and worship; (3) the right to freedom of thought and opinion; (4) the right to the possession and use of property; and (5) the right to equality. These are the rights that the eighteenth century advocates of the doctrine had in mind when they stated that fundamental rights should be incorporated in a written constitution and it is primarily these that find a place in the constitutions framed in the nineteenth century in many countries of Europe and America as a result of the revolutions through which they passed.

The first three of these rights do not call for any comment and they may be stated in the language of the French Declaration of the rights of man. 'No man should be accused, arrested, or held in confinement, except in cases determined by the Law, and according to the forms which it has prescribed. All who promote, solicit, execute or cause to be executed, arbitrary orders, ought to be punished, and every citizen called upon, or apprehended by virtue of the Law, ought immediately to obey, and renders

himself culpable by resistance.' 'The Law ought to impose no other penalties but such as are absolutely and evidently necessary, and no one ought to be punished, but in virtue of a law promulgated before the offence, and legally applied.' 'Every man being presumed innocent till he has been convicted, whenever his detention becomes indispensable, all rigour to him, more than is necessary to secure his person, ought to be provided against by the Law.' These articles deal with the freedom of person.

The right to freedom of religious belief and worship was laid down in another article. It is stated thus: 'No man ought to be molested on account of his opinions, not even on account of his *religious* opinions, provided his avowal of them does not disturb the public order established by the Law.' What the declaration stated in regard to the right to freedom of thought and opinion has already been quoted above in another connexion.

Among the private rights the most important place was given to the right of property. It has already been pointed out how the absolutism of monarchs resulted in the arbitrary and burdensome taxation of their subjects. Those who argued for the right of private property did not deny the need for taxation. The French Declaration itself says that a common contribution is necessary for the support of the public force, and for defraying the other expenses of government. They were only protesting against excessive taxation, forced loans, depriving a man of his property without paying compensation, and the expenditure of public revenues on undertakings which did not bring any return to the people at large. In spite of the extravagant language used by Thomas Paine the following observation of his is not wanting in truth. He says: 'War is the common harvest of all those who participate in the division and expenditure of public money, in all countries. It is the art of *conquering at home;* the object of it is an increase of revenue; and as revenue cannot be increased without taxes, a pretence must be made for expenditure. In reviewing the history of the English government, its wars and its taxes, a bystander, not blinded by prejudice nor warped by interest, would declare that taxes were not raised to carry on wars, but that wars were raised to carry on taxes.' It should also be remembered that in the age of absolutism and for a long time after it each individual was expected to live entirely on his own

income ; there were no organized remedies for unemployment or for old age pensions and the condition of the poor was miserable. It was therefore impossible for most men to lead a secure life if they became subject to taxation of an arbitrary character or to numerous taxes. This was one reason why the right to private property was regarded sacred and inviolable. There was also another reason for it. Governments placed various restrictions in the way of freedom of trade and business. Businessmen were not able to make the best use of all the opportunities that were arising for making large fortunes. Government therefore appeared to them not merely as an agency interfering with the free enjoyment of their hard won earnings but also preventing them through its unwise measures and policies from acquiring property. It was under circumstances like these that the right to property came to be regarded as a fundamental right.

The right to equality is another of the fundamental rights in the formula of the revolutionaries. The American Declaration of Independence asserted that 'All men are created equal.' The French Declaration stated that ' Men are born, and always continue, free and equal in respect of their rights. Civil distinctions, therefore, can be founded only on public utility.' The full significance of this right and the need for asserting it can be understood only in the light of the evils arising out of the system of inequality and privilege to which reference has already been made. Even today there are many who condemn the principle of equality. It is therefore necessary to know exactly what it meant to those who asserted it. Locke comes to our rescue in this connexion. He says : ' Though I have said above that "all men by nature are equal," I cannot be supposed to understand all sorts of "equality". Age or virtue may give men a just precedency. Excellency of parts and merit may place others above the common level. Birth may subject some, and alliance or benefits others, to pay an observance to those to whom Nature, gratitude, or other respects, may have made it due; and yet all this consists with the equality which all men have in respect of jurisdiction or dominion one over another, which was the equality I there spoke of as proper to the business in hand, being that equal right that every man hath to his natural freedom, without being subjected to the will or authority of any other man.' Concretely this meant that merely because

of birth or rank monarchs and noblemen had no inherent right to govern the other classes of people in the community. The view that some men are Gods and all others are beasts was the view on which privilege was built and it was this that was contradicted by the advocates of equality. Equality also meant that one man should not be used merely as an instrument for satisfying the needs of another, as serfs were used to satisfy the needs of functionless noblemen; that the humblest man in society deserved consideration at the hands of government just like those who occupied the highest rank and status and that the good things of life—wealth, comfort, power and influence—should not be monopolized by the small minority of the nobility and the clergy. Revolutionary thinkers believed that the happiness of man depends to a very great extent on the social environment and that the unprivileged classes had not the same kind of favourable environment as the privileged classes. Their aim in placing emphasis on equality was to secure to the unprivileged also an environment which would bring happiness to them. The acceptance of the validity of equality as a right resulted in the abolition of serfdom, the distribution of the burden of taxes in proportion to capacity, the division of feudal estates among the cultivating peasants, the removal of restrictions on industry imposed previously by guilds, and the opening of all offices of state to all classes of people. The truth underlying the right to equality should be measured by what it achieved in directions like these.

The enumeration of Fundamental Rights here given is not exhaustive. Only those that have been included in the French Declaration are mentioned here. But there are several other rights finding a place in the constitutions of other states. For instance the right of the people peaceably to assemble, the right against unreasonable searches and seizures, the right to trial by jury, are some of the additional rights included in the constitution of the United States. Similar variations, mostly of a minor character are to be found in the constitutions of the nineteenth century. They are the outcome partly of an attempt to deal in detail with some of the rights barely mentioned elsewhere and partly of the peculiar conditions that prevailed in other countries and the particular wrongs which they experienced at the hands of their governments. These do not however affect the essential content of the

doctrine. It is only when we come to the constitutions drawn up in the twentieth century that we find variations of major importance. These will be referred to in another section.

CHAPTER IV

The Theory of Limited Government

The essential characteristic of the doctrine of fundamental rights as it was developed in the age of absolutism is that it imposes severe limits on governmental action. It divides man's life broadly into two spheres—a private and a public one. The former is the sphere of his fundamental rights, a sphere in which he should be left entirely to himself without any interference from his government. This may not mean a life of entire isolation for him. It only means that whatever relations he has in this sphere with others are purely of a voluntary character. Government has no right—as was claimed all along by absolute monarchs—to enter this sphere. All its actions should be restricted to the regulation of his activities in the public sphere of his life.

It follows from this that the doctrine is intimately connected with the theory of limited government which was systematically worked out from different points of view by the thinkers of the seventeenth and the eighteenth centuries. According to this theory no government is justified in exercising unlimited power over its subjects. 'Unrestrained power not only leads to oppression of the subjects but invariably proves poisonous to those who possess it. They are always tempted to impose their canon of good upon others, and in the end they assume that the good of the Community depends upon the continuance of their power.' Other arguments were also put forward in support of this theory. As Locke says, absolute monarchs and princes are but men and made as others. They suffer from all the defects that human beings possess. 'For he that thinks absolute power purifies men's blood, and corrects the baseness of human nature, need read but the history of this, or any other age, to be convinced to the

contrary. He that would have been insolent and injurious in the woods of America would not probably be much better on a throne, where perhaps learning and religion shall be found out to justify all that he shall do to his subjects, and the sword presently silence all those that dare question it.' That governments consist of ordinary human beings after all may appear to be a commonplace fact but it is necessary always to be reminded of this, for the tendency of all thought that advocates concentration of power in the hands of rulers—the thought of writers like Hobbes—is to divide men into two categories, superior and inferior, —the first made to rule and the second to be ruled, a repetition in another form of the saying of Aristotle that a slave is a lower sort of being who is inferior from birth and incapable of ruling himself. The recognition of the fact, however, that even rulers are men makes it clear that no one is fitted to be entrusted with unlimited authority. A government of laws is much better than government even by the greatest of men.

The protagonists of the theory of limited government not only made out a case in its support but also tried to lay down some principle which would serve as a guide in determining the actual limits to governmental authority. This principle was referred to as the law of Nature or Reason, or as the principle of public good or of fundamental rights. These three expressions conveyed more or less the same idea to them. They proclaimed that the law of Nature is a higher law than that of kings, and that it 'stands as an eternal rule to all men, legislators as well as others. The rules that they make for other men's actions must, as well as their own and other men's actions, be conformable to the law of Nature—*i.e.*, to the will of God, of which that is a declaration.' From this they drew the inference that any exercise of authority not in accordance with this law was null and void. The principle of public or common good also led to the same conclusion. Governments exist for the promotion of the public good and not for the furthering of the private interests of those who are in authority. Their power is therefore limited to the securing of this good and they are precluded from doing anything that does not serve this purpose—'nothing being necessary to any society that is not necessary to the ends for which it is made.'

The idea that the authority of government is limited

by the law of Nature and by the principle of public good is not opposed to the view that it is limited by the fundamental rights of man. For these rights have their source in the law of Nature and their end is the public good. That man has a right to property, to liberty, and to equality is not a dogmatic proposition arbitrarily laid down by the revolutionary thinkers. In their opinion these rights are only corollaries drawn from the law of Nature. Moreover these rights secure not only the good of the individual but also the common good. It is of advantage to the Community as a whole that individuals should enjoy these rights. It is also worth while mentioning one other point in this connexion. Most of the revolutionary thinkers took a mechanical and not an organic view of society. They considered society to be a sum total of the individuals constituting it and that it had no existence apart from these individuals. To them public good was the sum total of the good of the individuals in society. With such metaphysical conceptions as these it is no wonder that they thought of the law of Nature, the principle of Common Good, and the concept of Fundamental Rights as only different ways of expressing the same basic truth, the truth that the powers of government should be limited.

The principle of limited government of which the doctrine of Fundamental Rights is an expression is one of great importance in the evolution of the modern state. Like the people's right to make and unmake their rulers through periodical elections and hold them responsible for their actions, it lies at the root of democracy, and differentiates it from dictatorial and totalitarian forms of government. It refuses to identify the state with society as the totalitarians do and recognizes that in the community there are numerous relationships and activities of a non-political character which ought to be left to the initiative of citizens either as single individuals or as members of voluntary groups. Some modern writers give the name 'culture' to the sphere thus reserved to the individual while their predecessors called it the sphere of Fundamental Rights. It matters little what technical language we use. What is to be grasped is that the doctrine of Fundamental Rights though seemingly antiquated in form stands for the same principle as democracy does and like democracy is opposed to totalitarianism which is only the modern form of the earlier absolutism of monarchs. It is worth

while noting in this connexion, as Prof. McIlwain has pointed out, that there is a significant distinction between a limited government—limited by Bill of Rights, and a weak government weakened by the separation of powers, checks and balances. The former is necessary and desirable while the latter is harmful.

CHAPTER V

Fundamental Rights in a Democracy

The doctrine of fundamental rights began as an attack on monarchical despotism. It however developed within a short period of time into an attack on governmental absolutism in general. Its advocates came to see that the process of reasoning which they adopted would lead them to no other conclusion. For according to their theory all governments—monarchical as well as representative—derive their authority from the people and are in the position of mere agents or delegates of the Community. They are entitled to exercise only the powers conferred upon them and no people would grant unlimited powers to their agents. It would be improper for them to do so. As Locke put it, 'Though the legislative, whether placed in one or more, whether it be always in being or only by intervals, though it be supreme in every commonwealth, yet, first, it is not, nor can possibly be, absolutely arbitrary over the lives and the fortunes of the people.' Rousseau also is emphatically of the view that no people can be said to enjoy liberty if they hand over to a legislature the power of making any law it likes, even though such a legislature might be a body elected by them. He expressed this view in his own inimitable way when he said: 'The people of England regards itself as free; but it is grossly mistaken; it is free only during the election of members of Parliament. As soon as they are elected, slavery overtakes it, and it is nothing.' It is the omnicompetence of the English Parliament that made him draw such a conclusion. A similar idea was expressed by Thomas Paine. According to him, it is not because a part of the government is elective that makes it less a despotism, if the persons so elected possess

afterwards, as a parliament, unlimited powers. Election in this case becomes separated from representation and the candidates are candidates for despotism.

It was not merely on grounds of theory that the advocates of fundamental rights felt the need for curbing the authority of even democratically elected bodies. They took this stand because history showed to them that such bodies could be as corrupt, as tyrannical and as oppressive as absolute monarchs. To Rousseau the Parliament of England, which was the only country that had a representative form of government in his day, was a corrupt oligarchical body which reduced such a government to a mockery. It was again this Parliament and not merely the British monarch George III that exercised its abstract right to tax the Americans and to regulate their trade, thereby driving them into rebellion. More important than all this was the experience which the Americans had of the representative legislatures which they themselves set up after the declaration of their independence. Several of these legislatures passed various measures interfering with the liberty and property of their citizens. They deprived individuals of their property without compensation or due process of law; they repudiated public debts; they issued worthless paper money; they impaired the freedom of the press; they suspended the right to trial by jury; they passed bills of attainder sentencing men to death or banishment without trial. They thus plunged into every excess of majority rule. There was therefore a genuine fear that even elected legislatures might become despotic and interfere with individual liberties, it and was realized that a declaration of fundamental rights restraining the authority of government would be quite as necessary in a democracy as in a hereditary monarchy. This explains why even in countries where monarchical despotism disappeared and democratic governments introduced, the inclusion of fundamental rights in the constitution has become a matter of course. The subsequent experience of the working of democratic institutions has only confirmed the truth first made clear by the founders of the American Constitution, that even power emanating from a popular source has to be restrained.

It is because of this that one should not call a system of government democratic simply because power is lodged in persons elected by the people at large. It must have, a

has been pointed out in the previous section, the additional characteristic that it recognizes the right of the individual to lead a life of his own in certain directions. This is the true spirit of democracy and fundamental rights have as much a place in it as in monarchical governments.

No writer of modern times has so forcibly made out a case for the protection of individual liberty in a democracy as John Stuart Mill did, although he did not speak the language of fundamental rights. He was afraid that mass opinion which meant the opinion of mediocre minds and the pressure of the majority, might repress the individual to a far greater extent than even monarchical and aristocratic governments; and he suggested a number of practical devices for safe-guarding the individual from the tyranny of majorities—safe-guards which like proportional representation were put into effect in many of the post-war democracies.

One aspect of the danger to the fundamental right of individuals to liberty in a democracy referred to by Mill has become prominent in more recent times in states containing people belonging to different nationalities, one of which by the mere force of numbers has become politically dominant. The practice of democracy in such states has resulted in several cases in the imposition of the culture of the majority group over the minority groups. To the statesmen who were responsible for the settlement of Europe after the first World War this appeared to be such a serious source of disturbance to the general peace of the world, that they took special steps to guarantee rights to minority groups in most of the newly created states like Poland and Czecho-Slovakia and made the League of Nations the guardian of such rights. As Professor Laski puts it :- 'Even in a democracy, we must have ways and means of protecting the minority against a majority which seeks to invade its freedom. Mankind has suffered much from the assumption that once the people had become master in its own house, there was no limit to its power. You have only to remember the history of racial minorities like the Negroes, of religious or national minorities like Jews and Czechs, to realize that democracy, of itself, is no guarantee of freedom.' It is this aspect that has the greatest significance in India at the present day. It lies at the basis of the fears entertained by Muslims, the scheduled classes and several other minority groups in a free and democratically governed India of the future.

CHAPTER VI

History of the Doctrine

The doctrine of Fundamental Rights may be said to have passed through two stages in the course of its history. The first was the eighteenth-nineteenth century stage and the second the twentieth century one. In the second stage it differed in several respects from what it was in the first one. In the first place its content became much wider. Many rights which were not included in the original formula came now to be included in it. At the same time it should be noted that some rights included in it in the earlier stage now underwent a modification and to some of them a relatively less significance came to be attached. In the second place while the doctrine called only for a negative action from the government in the first stage—action which was expressed technically through the phrase 'Laissez—faire'—it demanded positive action from the government in the second stage. In the third place the doctrine of rights came to be coupled with a doctrine of duties in the second stage, and this was done with a view to meet the criticism levelled against the original doctrine by some of its opponents. Each of these points of distinction deserves a brief notice.

All these modifications in the doctrine are the outcome of the industrial revolution through which the western countries passed in the course of the nineteenth century. In consequence of this revolution the class of the proletariat came into existence. It fell to the lot of this class to suffer from chronic unemployment, from excessive hours of work, from relatively low wages, and from all those unhealthy conditions that are characteristic of modern city life. While scientific progress and mechanical inventions have enormously increased the amount of wealth produced, the comforts and conveniences which fell to the share of the working classes did not show a proportionate increase. Their standard of education was comparatively low. If by rights are meant the necessary conditions which enable men and women to lead a happy life or become the best which they are capable of becoming, the evils created by the industrial revolution were a negation of rights so far as the labouring classes were concerned. All this gave rise to socialistic thought. With the extension of the suffrage to all adults the working classes were able to make their influence felt to some extent. The result was that

the truth of this statement is best brought out by the history of the individual's right to association. In most of the twentieth century constitutions this right is definitely recognized. The German Republican Constitution, for instance, said : ' Freedom of association for the maintenance and improvement of labour and economic conditions is guaranteed to every one and for all occupations. All agreements and measures tending to restrict or obstruct such freedom are illegal.' So fundamental has this right become today that its presence is taken as one of the most important criteria for distinguishing a democracy from a dictatorial or a totalitarian form of government.

In a sense the industrial revolution is also responsible for a changed attitude towards the right of property, leading to a lesser amount of significance being attached to it in the twentieth century constitutions. As a result of this revolution privilege and inequality of a new type came into existence. Industrialists, business men and financiers who revolted against the privileged position of the nobility and the clergy in the eighteenth century came now to occupy a similar position in relation to the working classes. The fundamental right to property and to economic liberty meant nothing or very little to these classes. They had not much property of their own and they were in practice completely under the control of their capitalist employers. As Professor L. T. Hobhouse puts it : ' It is not inequality as such that is the fundamental fact of our system. It is the entire dependence of the masses on land and capital which belong to others. Five out of six, I suppose, of the children now born, are born to no assured place in the industrial system. They have no means of subsistence of their own. They have hands and brains, but they have neither lands to till nor stock to till it with. What is more, only a fraction of our population could be supported by agriculture, and for the cotton-spinner, the railwayman, or the coal miner there is no sense in talking of his owning the means of production as an individual.... The institution of property has, in its modern form reached its zenith as a means of giving to the few power over the life of the many, and its nadir as a means of securing to the many the basis of regular industry, purposeful occupation, freedom and self-support.' The question therefore arose whether property which gave one man so much power over others should still be regarded as a right.

The attitude towards taxation also underwent a change. There was justification for regarding it as an interference with the right of property when as in the pre-revolutionary age its proceeds were spent mostly on wars and on maintaining extravagant courts. With the growth of democracy and with the transformation of the police state into what has come to be known as the social-service state, public revenues are being increasingly spent on the provision of better conditions of life to the masses. The taxation therefore of the wealthier classes is now accepted as a legitimate method for securing the revenues required by the state. Under circumstances like these the right to property has today lost much of its earlier sanctity and there are large sections of people in every country advocating its complete abolition. Several of the articles in the constitution of the German (Weimar) Republic illustrate this change in the general attitude towards the right of property.

A similar change though not to the same extent or degree is noticeable in regard to liberty of discussion and opinion. These are considered to be of value only to those who have the capacity as well as the opportunity for discussion—to men who possess a sound education and have easy access to the press and other organs of public opinion. The working classes do not possess these advantages. Even in western countries it is only education of the elementary grade that is universal and compulsory. The large majority of the people do not enjoy the benefits of higher education. To them liberty of discussion does not appear to be of much significance. Moreover, owing to excessive hours of work necessitated by the industrialism of the modern age they have very little leisure to devote to intellectual pursuits. In addition to these handicaps, they find that all organs of opinion are practically controlled by the propertied classes. Those who wish to give expression to opinions not shared by men of property have very little access to the press or the platform. It is circumstances like these that have made large sections of the public indifferent to the right of liberty of opinion and discussion. This does not however mean that any one is anxious to exclude them from the list of fundamental rights. As a matter of fact they have been given a prominent place in the twentieth century constitutions.

The change in the nature of the action that the doctrine

which the doctrine passed in the second stage of its history produced two effects so far as the technique of constitution-drafting was concerned. They made the sections devoted in these constitutions to fundamental rights much lengthier. And the increasing emphasis placed on positive action by government led to the inclusion of a number of provisos and exceptions to the rights enumerated, thus leaving a large amount of freedom to governments to undertake the necessary legislation.

The hold of the doctrine of fundamental rights over constitution-making has become so firm that even in the constitution of the U.S.S.R., a Communist state, there is an enumeration of these rights. The right to work, payment for work, rest, social insurance and education, state protection of the interests of mother and child, granting pregnancy leave with pay, and the provision of a wide network of maternity homes, nurseries and kindergartens, the equality of the rights of citizens irrespective of their nationality or race, freedom of conscience, of speech, of the press, of assembly and meetings and of all sorts of associations have been guaranteed in the constitution. All these are the rights to be enjoyed by citizens. As non-workers are practically excluded from citizenship, fundamental rights do not extend to them. The rights therefore are not rights of men as men but of toilers and workers.

CHAPTER VII

The Safe-guarding of Rights

Assuming that man has certain fundamental rights in the absence of which he will not be able to develop his personality, the question that next arises is what devices should be adopted to give them a reality in practice and to prevent their infringement or neglect by government. It is quite true that rights may be infringed by private individuals also and that the risk of such infringement is great when government is weak or swayed by the influence of vested interests. But the original formulators of the doctrine did not concern themselves with such infringement as they were engaged in seeking remedies against arbitrary

rule. They were only interested in preventing governmental infringement. To secure this purpose they laid down one general device and three specific devices—though the last of these specific devices, the judicial review, has not been universally adopted.

The general device is a representative or a democratic form of government. Where those who are in authority come to their office through periodical elections and submit themselves to the verdict of the people there is a certain amount of guarantee that they will not infringe the rights of the citizen and that they will undertake all measures necessary to give effect to them. It may therefore be laid down as a general proposition that rights will not be safe or become effective unless the form of government is democratic.

The specific devices are the enumeration of rights in clear and unambiguous language, the incorporation of the rights enumerated in a written constitution, and making the constitution rigid in the sense of placing it beyond the control of the ordinary organs of government. In addition to these there is in the United States and in the countries whose constitutions are modelled on that of the United States the device of Judicial Review under which Courts are given the special power of declaring null and void any law or administrative action which is in conflict with the rights incorporated in the constitution. The judiciary becomes in this arrangement the guardian and the protector of fundamental rights.

The enumeration of rights in clear and unambiguous language is a first step in safe-guarding them against all encroachment. This enables governments to have a definite idea of what they may legitimately do and what they may not. And when they are incorporated in a written constitution it serves the same purpose as the sacred scriptures serve in the sphere of religion. The significance of this device is best brought out in the preamble to the Declaration of the Rights of Man issued by the French Assembly. It runs as follows: 'The representatives of the people of France, formed into a National Assembly, considering that ignorance, neglect, or contempt of human rights, are the sole causes of public misfortunes and corruptions of government, have resolved to set forth in a solemn declaration, these natural, imprescriptible, and inalienable rights; that this declaration being constantly

present to the minds of the members of the body social, they may be for ever kept attentive to their rights and their duties; that the acts of the legislative and executive powers of government, being capable of being every moment compared with the end of political institutions, may be more respected; and also, that the future claims of the citizens, being directed by simple and incontestable principles, may always tend to the maintenance of the constitution, and the general happiness.' It was more or less in the same strain that Thomas Paine wrote: 'It [the constitution] was the political bible of the state. Scarcely a family was without it. Every member of the government had a copy; and nothing was more common when any debate arose on the principle of a bill, or on the extent of any species of authority, than for the members to take the printed constitution out of their pockets and read the chapter with which such matter in debate was connected.'

Mere incorporation of rights in a written constitution cannot serve as an effective safe-guard unless the constitution itself is placed beyond the control of the legislative and executive organs of government. Thinkers of the revolutionary age were of the opinion that a 'constitution' deserved its name only when it had this characteristic. This is a point of some significance, as many are apt to define a constitution as a body of principles determining the form of government in a state whatever that form happens to be—dictatorial, representative, or democratic. This was, however, not the view held by the formulators of the doctrine of Fundamental Rights. They postulated three features in respect of it. One is that it should be made directly or indirectly by the people themselves. This is a corollary from the principle of popular sovereignty, which they laid down. The second is that it must define and therefore limit the powers of government. This is a corollary from their theory of limited government. Thirdly the government is the creature and the servant of the constitution and not its creator or master. It should not therefore have the power to amend or modify it in any way. Any such amendments should be made by a special body deriving its authority from the people or through a special procedure. As Thomas Paine puts it: 'A constitution is a thing *antecedent* to a government, and a government is only the creature of a constitution. The constitution

of a country is not the act of its government, but of the people constituting its government.....A constitution, therefore, is to a government what the laws made afterwards by that government are to a court of judicature. The court of judicature does not make the laws, neither can it alter them ; it only acts in conformity to the laws made ; and the government is in like manner governed by the constitution.'

The insertion of rights in a written and rigid constitution may not be of very great utility in safe-guarding them unless there is some arrangement under which it is possible to declare illegal any law enacted by the legislature and any action resorted to by the executive, when they are in conflict with the rights incorporated in the constitution. There must be some device for upholding the supremacy of the constitution. A mere declaration that it is the supreme law and that every one should give his primary allegiance to it is not enough. Such a device is found pre-eminently in the constitution of the United States, and it may even be regarded as its unique feature. There the courts are empowered to declare invalid any legislative measures or other acts of government which are inconsistent with the constitution and the fundamental rights it contains. Under the name of judicial review this power is regularly exercised by courts. From the very beginning it was considered to be a necessary element in a system of limited government. As the Federalist puts it : 'By a limited constitution I understand one which contains certain specified exceptions to the legislative authority ; such, for instance, as that it shall pass no bills of attainder, no *ex-post-facto* laws, and the like. Limitations of this kind can be preserved in practice in no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenour of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.'

Courts are eminently fitted to discharge this function primarily because they are less partisan and less amenable to the passing changes in public opinion than legislatures and executives. The latter owe their office to election ; they are in office only for short periods ; they always belong to some party or other ; and their view of public events is a short-period and not a long-period one. Judges occupy a wholly different position in most of the countries.

They do not owe their office to popular election; their tenure is more or less permanent; their salaries are not subject to the vote of the legislature. They are, therefore, independent and can look at things from an impartial and non-partisan standpoint. It has therefore been considered best that they should be made the guardians of fundamental rights. This is also in essence the principle underlying the separation of the judiciary from the executive.

CHAPTER VIII

Criticism of the Doctrine

Various questions have from time to time been raised in connexion with the Doctrine of Fundamental Rights. It has often been asked whether the individual has any rights independently of government. (It should be noted here that this is different from the question whether he has any rights independently of society.) The answer depends on what we mean by rights, and the meaning which has to be given to the term has already been defined. Understood in that light the conditions that will enable a man to pursue happiness or to develop his personality have their source not in government but in human experience and our knowledge of human nature. Government is only an instrument—and one among a number of instruments—devised by man to maintain these conditions. Another question often asked is whether it is possible to draw a list of these rights. An affirmative answer may be given to this question also. For in every age and in every country men have a certain conception of the ideal life and also of the means that enable them to realize the ideal. It may be that there is no unanimous agreement among all on these matters. Dissenters from the generally accepted ideas in all fields of life are always to be found. What is required, however, is not unanimity but a general consensus of opinion. Of course in periods of transition dissenters will be on the increase. But as a result of the conflict between the upholders of the old view and of the new view a new consensus is sure to appear and this becomes the basis of a new ideal and a new scheme of rights. In

human history there are always periods of stability and periods of change. This indicates not that we cannot draw a list of rights, but only that a list drawn by the people of one age may not hold good in respect of another. Each age has to solve its own problems and no generation should arrogate to itself the right to dictate to subsequent generations. It has already been pointed out that as a matter of fact the list has undergone a change in the course of the last two centuries and that the virtue of the doctrine consists in its flexibility. The fact that lists have been drawn and incorporated in several written constitutions shows that there is no difficulty in doing the work. It is true that the original formulators of the doctrine made the mistake of thinking that it would be possible to draw a list which would hold good for all time. That position has now been given up. Every advocate of the doctrine recognizes at present that it has a changing content.

A third question that is asked is whether all the rights included in the list are equally fundamental and whether there is not the possibility of conflict between one right and another—as for example between the right to liberty and the right to equality or the right to security—and which right has to be preferred when such a conflict arises. In answering this question two or three points have to be kept in mind. The doctrine deals with principles and not with all the details arising in the course of their practical application. Moreover terms like liberty, equality, etc., should be understood in the sense in which they are understood by the advocates of the doctrine and not given an arbitrary meaning. When so understood much of the conflict disappears. If equality is understood for instance in the sense of equality of opportunity not only is equality not in conflict with liberty but, as Professor Laski has shown, the one cannot exist in the absence of the other. In cases where it is not possible to give equal and simultaneous effect to all the rights, some choice on grounds of priority and urgency has to be made. This is what is found necessary in all spheres of life. Among what we regard for example as our primary needs—food, clothing, shelter, rest, etc. we have in times of stress to give preference to some as against the others. This does not mean that they cease to be primary needs. The same is the case with regard to fundamental rights.

Another important question is whether all individuals

within a community have the same rights or whether they vary from individual to individual. It may be remembered in this connexion that the doctrine began as a protest against the traditional system of social and political organization under which certain classes in society—the nobility and the clergy—were given rights and not the rest and emphasis was naturally laid on the rights of man. Experience, however, has shown that in every society individuals are in different situations and performing different functions and that the needs of some are different from those of others. The needs of children are different from those of grown-ups; of women to some extent from those of men; of workers from those of employers. But the inference to be drawn from all this is not that there are no rights of men as men but that while some rights are common to all, there are also certain other rights which have to be guaranteed to particular individuals according to the functions they discharge in society or the station in which they are placed. It has already been pointed out that the doctrine has been modified on this basis and that in the constitutions framed in the twentieth century provision is made for the rights of all men as well as for the rights of special groups like women, children, labourers, peasants, etc. What is needed is the elaboration of the doctrine on lines like these and not its rejection.

There is, however, a practical difficulty in any attempt at elaboration so as to include in the list the rights of special groups. It is the outcome of divergent views on the nature of human society held today by Marxists and all those who believe in the inevitability of class conflict. According to them the antagonisms between class and class are so acute and the interests of one class are so much opposed to those of another that it is impossible to guarantee rights to all. To provide workers with rights is to deprive the employers of their rights; and all efforts to reconcile these divergent interests and to include in the constitution a system of rights satisfactory from the points of view of both the classes is, in their opinion, more or less futile. This is not the place to go minutely into the merits and demerits of the Marxian doctrine. It will suffice to state that the position which it assumes is rather an extreme one and that in spite of class distinctions based on economic differences there are and have always been various factors promoting social harmony. Moreover, though all classes

may fight for rights the same importance need not be attached to every class. Taking the stage of development attained by any society it may be said that some functions are more important than others and the general consensus of opinion that tends to prevail decides the relative importance of different classes and groups. Compromise therefore becomes possible and the difficulty referred to is not an insuperable one. This is illustrated by the system of rights incorporated in the constitutions of the German Republic, of Jugo-Slavia and some other central European states established after the last World War.

The supreme value of the doctrine of Fundamental Rights lies in the emphasis it places on the view that government—the custodian of organized power and force in society—is not an end in itself but only a means for the promotion of the welfare of individual men and women and that a government is good or bad in proportion to its success or failure in accomplishing this object. To deny the truth or the validity of the doctrine is to condemn this view of government. This view carries along with it the implication that welfare is always the welfare of individuals and not of groups—states, nations, castes, classes churches—whatever their nature or size happens to be. The individual is and ought to be the centre of interest. He is the source of all energy. Every organization to which he belongs—and government is one such organization —is valuable to the extent to which it liberates his energy and enlarges his freedom. The doctrine of Fundamental Rights has admirably fulfilled this purpose. It has served as a principle for emancipating the individual from the tyranny of government. It lies, as has already been shown, at the foundation of modern democracy and it will continue to have value as long as mankind believes in this form of political organization. Moreover, even the states that bear at present the name of democracy are not completely organized on democratic lines. Caste and privilege still remain in many of them, though under other names. The doctrine of Fundamental Rights has, therefore, an important function to discharge even in such countries. The rise of totalitarianism and dictatorship in the contemporary world has opened men's eyes much more widely to the intrinsic importance of the doctrine.

It is now time to turn our attention to some of the attacks levelled against the doctrine. It must have

become clear by now that it is primarily an ethical doctrine. It tells us what is right and good for government to do, and what it should abstain from. The question that now arises is whether ordinary ethical maxims like these should guide governments in their conduct, and whether even in such a case it is necessary and safe to reduce them to a set of political principles. Those like Machiavelli and Hobbes who argued for power politics laid it down, as has already been shown, that the rules of private morality are not applicable to governments. The disastrous consequences of this view have already been referred to, and it may now be concluded that no distinction should be drawn between rules of private and public morality. Morality is one though its application may vary from situation to situation.

The question as to whether they should be reduced to a set of political principles and be incorporated in a constitution has also been answered in the affirmative. But there are some who think that such a procedure is unnecessary in a democratic state. The author of the Federalist put forward this view in the following words: 'It has been several times truly remarked that bills of rights are, in their origin, stipulations between kings and their subjects, abridgements of prerogative in favour of privilege, reservations of rights not surrendered to the Prince. ....It is evident, therefore, that according to their primitive signification they have no application to constitutions professedly founded upon the power of the people, and executed by their immediate representatives and servants. Here, in strictness, the people surrender nothing; and as they retain everything they have no need of particular reservations.' It should be noted that the Federalist was answering an objection to the ratification of the constitution framed by the Philadelphia convention on the ground that it contained no bill of rights. His contention was that it was unnecessary in a democratic state. This point of view has already been examined and the conclusion was drawn that as a safe-guard against democratic legislatures trampling on rights of individuals and of minority groups, it is necessary to convert ethical maxims into political principles and incorporate them in a written constitution.

The doctrine is also attacked on the ground that its incorporation in a constitution is dangerous. This view

was expressed by the Federalist. The author says: 'I go further and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colourable pretext to claim more than were granted.' The argument looks plausible and it is not possible to draw an exhaustive list of rights—and it is not desirable also to do so lest it should make the constitution too lengthy and complicated—however carefully and minutely the subject be gone through. Many omissions are bound to exist and government may interfere with them on the ground that they do not find a place in the constitution. Even this position, however, is not a correct one. The danger is more or less imaginary. The alternative is not between including all rights and no rights. It is to secure some rights at least and to revise the list when the need for more rights is felt in subsequent times.

A third line of attack is to raise the question whether after all the rights become effective even when they are incorporated in a written constitution. Is the purpose aimed at really achieved in practice? After a terrible civil war the champions of Negroes in the United States were able to incorporate into the Constitution the fourteenth amendment which runs as follows: 'All persons born or naturalized in the United States and subject to the Jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United states, nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' No article in any constitution gives expression to the right to equality in clearer and more forceful language than this. Yet the Negroes have continued to be a depressed class in the United States all these years.

When critics of the doctrine point to its ineffectiveness it is not merely instances like the fourteenth amendment that they have in mind. They point out in the first place to the difficulty of securing rights in countries where there is no judicial review—as is the case in all European countries practically—and where the legislature determines

its own competence. The remedy for this is to provide for judicial review also. In the second place, the question is raised whether even with judicial review it is possible to secure rights in the sense in which they were understood by the original framers of the constitution. American experience is our most important guide in this matter and it shows that while judicial review gives effectiveness to rights it deprives them of the quality of certainty and definiteness. Judges after all are human beings. They have their own prejudices and predilictions. They import into the law they are called upon to interpret their own notions of right and wrong. This is inevitable. As Professor Finer says, there is no indisputably authoritative system of interpretation; nothing which is universally accepted. The result is that meanings given by judges to terms like 'due process of law', 'commerce', 'freedom of contract', etc. have often changed and an element of uncertainty has been introduced in the matter of safeguarding of rights. It should, however, be recognized that this is a characteristic feature of all judicial interpretation whether it relates to constitutional or to ordinary law. No one argues from this that there is no need for defining law. The only inference that can be drawn from this is not that judicial interpretation is ineffective in securing rights but that it is subject to certain limitations in this regard. It is not a perfect instrument.

Certain issues have also been raised in connexion with rights that demand positive action from government. In the first place they cannot become effective unless government undertakes legislation for the purpose, creates the necessary administrative machinery and incurs a large amount of expenditure. But legislatures even though democratically elected may not be prompt in taking steps like these. It was the fear that legislatures might delay action in respect of rights like these that made the framers of the post-war constitutions introduce a clause stating that the legislature should undertake the necessary legislation and prescribe detailed regulations. In spite of a clause like this it may be beyond the capacity of a state to carry out a detailed programme for giving effect to all rights. For instance the philosophy behind the constitution of the Weimar Republic was that of a social democracy. It contemplated the modification of an acquisitive into a functional society and it was on this basis that the list of

fundamental rights had been drawn. It is however clear that this is a task which would take generations of people to accomplish. It is this difficulty that makes several people attack the doctrine of Fundamental Rights as ineffective.

In answering these critics two considerations have to be kept in mind. As a matter of fact in the years following the last World War efforts were actually made by several central European states, in whose constitutions these rights occupy a prominent place, to undertake the necessary legislation. Secondly, as Professor Zurcher points out, ' even if this were not so it would still be unwarranted to regard them [Bills of Rights] as verbiage. Whatever their immediate effects, they are now and will continue to be, judicial standards for public action. Their phraseology may be ambiguous and contradictory; it may be reminiscent of political rhetoric rather than of the lawyer's brief; nevertheless, ensconced in the constitution these rights cease *ipso facto* to be political nostrums, and become judicial norms. These observations are particularly appropriate in the case of social rights. Hitherto these have been political slogans, the catch-phrases of the politician who articulated the aspirations of the disinherited in society. Henceforth they are a part of the fundamental law of the land; they have acquired juristic as well as political significance and the jurist as well as the politician must try to secure their realization in the formal activity of the state.'

It is also argued that rights demanding positive action from government may not secure effectiveness, not merely because of the neglect and the indifference of legislatures but also because judicial review cannot be of any use in enforcing them. The German constitution, for instance, says: ' Provision shall be made for the education of the young by means of public institutions.' Is it possible for any individual to obtain from a court a decree that such provision shall be made, if government does not move in the matter? Of course no such decree will be issued by courts. This inaction by courts is based on the well-recognized distinction that is drawn even in the courts of the United States between matters which are justiciable and those which are political and the refusal of courts to interfere in matters where high questions of policy are involved.

The conclusion, however, that has to be drawn from

this situation is not that the incorporation of such rights in a constitution is ineffective but that the citizens should depend upon other instruments besides courts for securing such rights. "What is required is a lively public opinion and eternal vigilance on the part of citizens. As Professor Laski puts it, any Bill of Rights depends for its efficacy on the determination of the people that it shall be maintained, a view not different from that of the author of the Federalist who, referring to the liberty of press; said : ' Its security, whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government.'

Another weapon in the armoury of attack against the doctrine of Fundamental Rights is that it involves the danger of making the constitution of the state quite antiquated and that it strengthens the forces of conservatism and becomes the guardian of vested interests. This arises out of two features characterizing the doctrine. One is that the list of rights that may be drawn at any time for being incorporated in the constitution will naturally be based upon the ideals and experiences of the people living at that time. But circumstances and the needs and requirements of the people undergo a change and unless there is a corresponding change in the scheme of rights, the interests of the later generations of people are bound to suffer. The second is that all constitutions providing for fundamental rights are rigid in character and it is not an easy thing to amend them. In consequence of these two features it is argued that the danger referred to is real.

There is much force in this line of attack. The history of the interpretation of constitutional law by the Supreme Court in the United States gives weight to it. Rights which were held sacred in the eighteenth century when the country was agricultural and had a small population are still regarded as sacred in spite of the fact that the country has become highly industrialized, with a population of more than a hundred millions. Judges have to proceed on the assumption that they should do nothing which would not be in harmony with the eighteenth century rights. But these are rights which safe-guard the vested interests of property, of industrial and financial magnates and generally of the richer classes of people. They are really in conflict with the rights and liberty of the general

mass of people. So far as the masses are concerned the danger to rights does not arise so much from governmental encroachment as from encroachment by the propertied classes. Attempts on the part of government to protect the rights of labourers through ordinary legislation have become futile owing to such legislation being declared unconstitutional by courts. A progressive economic and social policy has become difficult.

The question here as in many other similar cases is one of the merits and defects of stability versus progress, and of majority versus minority rights. In a healthy community a balance should be maintained in respect of all these. But what has happened in the United States, and what is likely to happen in states modelling their constitutions on that of the United States is that the sacrifice in terms of progress and majority rights that has to be made to gain stability and maintain minority rights may be too high. A liberal interpretation of the constitution by courts will go a certain way in securing progress and this has occasionally happened in the United States. More can be achieved if the minority of propertied classes are more reasonable and are prepared to concede to the majorities their just rights. Other remedies that may be suggested are a simpler and easier process for amending the constitution and removing from it obsolete rights and including in it the new rights needed for the new age and making the list of rights as concise as possible.

The doctrine of Fundamental Rights is also held responsible for the large amount of legislative authority that judges come to exercise in passing judgement on the constitutionality of ordinary laws. They have an effective veto over legislation. They constitute, as one writer says, a third legislative chamber. It is not proposed to go into all the details connected with this subject. It is enough if it is noted that this is one of the inevitable consequences of the attempt to make Fundamental Rights effective.

From this survey of the merits and demerits of the doctrine it may be concluded that with all the drawbacks and the difficulties associated with it, in its practical application it has served a useful purpose—first as a precaution against abuse of power by those in governmental authority and secondly as an effective reminder to them of the duties and obligations they owe to the governed.

It is not likely that the doctrine will be easily abandoned. It will continue to form an integral part of any political system that is based on democratic foundations. Every extension of democracy will also mean the extension of its influence.

CHAPTER IX

The Demand for Fundamental Rights in India

In recent years there has been a demand for the incorporation of Fundamental Rights in any constitution that might be framed for India. In the main there is a close resemblance between the circumstances that led to such a demand in western countries and the circumstances in India, although in respect of some points of detail there is a difference. If according to Professor MacIver systems of government are either despotic or democratic, the system of government established by the British in modern India belongs to the category of despotism. In safe-guarding its own interests it had necessarily to impose a number of restrictions on the civil liberties of the people—liberty of person, of speech, and of association—reminiscent more or less of similar restrictions found in European countries in the pre-revolutionary age. And these restrictions became more onerous with the growth of the national movement in the country during the last few years. A factor to be taken into consideration in this connexion is the rise of a strong middle class and a class of intelligentsia, similar to the classes that became prominent in Europe during the seventeenth and the eighteenth centuries as leaders of revolutionary movements. These classes were very much influenced by the liberal ideas of the West—the ideas of liberty and equality and of government based on the consent of the governed. It is no wonder that these classes resented the restrictions imposed on the civil liberties of the people and the inferior status to which they were reduced relatively to the position occupied by the European

and the Anglo-Indian communities in the country. In consequence of all this the doctrine of fundamental Rights has taken a firm hold of the intelligentsia and in the constitutions drafted by them or under their influence—like the constitution prepared in 1928 by the All-Parties Conference—an important place is given to Fundamental Rights.

There are, however, two other features in the Indian situation which have necessitated additional significance being attached to this subject, although parallels to them are not totally absent in many other countries. One is the system of caste and the other is the existence of what may be called the problem of minorities.

That caste is the dominant feature of the Indian social system is too well-known to need any detailed description. It involves a hierarchical organization of society, based on birth. Members of some castes occupy a privileged position while others suffer numerous disabilities. It is entirely opposed to the principle of equality. Under this system the lot of the depressed or the untouchable classes who are segregated outside the village without access to public schools, public roads and public wells is specially hard. It is true that in recent times there has been a revolt against caste. The spread of English education, the industrialization of the country, the growth of political nationalism and the impact of the individualistic ideas of the West have done much to undermine its rigour. Though castes exist today the idea that some of them are superior and that some others are inferior has lost its original force. But all the same the division of society into castes has not disappeared. Though a generation ago many entertained the hope that within a short period of time there would be no system of caste in the country, new tendencies have unfortunately come into existence which seem to give a fresh lease of life to it. The most powerful of these tendencies is the recognition given to it by the British Government itself. Caste has been taken as a basis for recruitment to the army and to the civil services. Preferment is given to certain castes over others in this respect; and castes receiving such a preference are interested in keeping alive the system and the spirit of exclusiveness underlying it. In all departments of administration—in courts, in schools, and in public offices—an enquiry into the caste of the persons concerned is a prominent feature. Even those who want to forget their caste are forcibly reminded of it.

The political reforms introduced into the country since 1919 made provision for representation on the basis of caste and for separate caste electorates to some extent and this has contributed to the strengthening of the caste mentality. In the struggle for power ambitious politicians find it to their personal advantage to start caste organizations. Schools, hostels, co-operative societies and other institutions with membership open only to persons belonging to particular castes are being started even by the educated *elite*. The result is that the system of caste continues to exist. The intrinsic worth of the individual is forgotten and it is measured on the basis of the caste to which he belongs. A neo-caste feeling has also come into existence as a consequence of which there is a possibility of members of the so-called higher castes (of old days) now being persecuted for the sins of their ancestors. One is reminded of the attitude adopted by the communists and the proletariat classes in the Soviet Union towards the capitalists and the *Kulaks*.

In this atmosphere of caste it is therefore necessary that the rights of man as man should be recognized, that no disability should be imposed on any person on the ground that he belongs to this or that caste and that the principle of equality of all should be accepted as the basis of any political system in the country. The constitution prepared by the All-Parties Conference recognized the need for this outlook and included a number of articles in its Declaration of Rights, especially with a view to remove the disabilities from which the depressed classes have been suffering. We have now come to a stage when it is equally necessary to see that no fresh disabilities are imposed on persons who belong to the other castes.

It was considerations like these that made the Hindu Mahasabha press for the following fundamental rights being included in the Government of India Act of 1935:

> (1) As for civic and economic rights, none shall be prejudiced by reason of his caste or creed in acquiring or enjoying those rights which should expressly include the rights of owning, purchasing, or disposing of landed properties in the open market without any restrictions of any kind whatsoever and the freedom of choice of any profession or calling. All laws existing at present in India based on caste discriminations and acting prejudicially to the enjoyment of these rights

should automatically lapse. (2) That no person should be under any disability for admission to any branch of public service by reason of his religion or caste. (3) Membership of any community or caste or creed should not prejudice any person for purposes of recruitment to public services or be a ground for non-admission, promotion or supersession in any public service or to any public institution.

The next feature of the Indian situation is the existence of a number of religious and linguistic minorites in the country. Ot these the Muslims are the most important. They are also the best organized and it is the supreme need to assure them that in any democratic constitution that may be framed for India their cultural and other interests would be safe, that has brought the fundamental rights of minorities to the fore-front in Indian politics. The Sikhs in the Punjab and the Christians throughout the country are some of the other religious minorities. The problem created by the presence of these minorities is similar to the problem of minorities in some of the states of Central and Eastern Europe. Referring to this aspect the Report of the All-Parties Conference states thus: 'Another reason why great importance attaches to a declaration of rights is the unfortunate existence of communal differences in the country. Certain safe-guards and guarantees are necessary to create and establish a sense of security among those who look upon each other with distrust and suspicion. We could not better secure the full enjoyment of religious and communal rights to all communities than by including them among the basic principles of the constitution.'

This conclusion is not in any way affected by the claim put forward by a large section of the Muslims that they are a nation in India and not a mere minority and that as a nation they are entitled to enjoy the right of self-determination and establish sovereign states of their own in north-western and north-eastern India. For even when such states come into existence there will be a problem of minorities in the country. In these newly formed states there will be Sikh, Hindu and Christian minorities by the side of Muslim majorities. As so many competent observers have put it, the creation of Pakistan does not by itself solve the problem of minorities. The need for safe-guarding their cultural interests through a

Declaration of Rights in a written and rigid constitution will continue to exist. The resolution of the Indian National Congress adopted in 1933 on this subject may be taken as a model for the present purpose.

It has already been pointed out while tracing the history of the doctrine that in its second stage its content underwent a change and many rights were included in the list which demanded positive action from government. This feature is noticeable in the demand for rights put forward by several sections of the people before the Joint Parliamentary Committee in England when the Government of India Bill was under discussion in 1933. Women's organizations urged for instance that, 'the recognition of the principles of equality should find a definite place in the declaration of the Fundamental Rights of Citizenship in the Constitution Act.' The National Trades Union Federation demanded a declaration guaranteeing to the workers the right to work, and the right to provision against old age, invalidity, etc. The Bengal Trades Union Federation wanted a specific guarantee for ensuring 'fair rent and fixity of tenure to agricultural tenants from whom industrial workers are recruited, for the maintenance of the health and fitness of workers, securing a minimum wage for them, the protection of motherhood, welfare of their children and the economic consequences of their old age, infirmity and unemployment.' The Congress resolution referred to above also makes provision for the special rights of labour and lays down an economic and social programme.

Professor Barker remarks: 'It seems curious, at any rate *prima facie*, to see the doctrine of natural rights, so long connected with the radicalism of Tom Paine becoming the corner-stone of alarmed conservatism.' This feature is well illustrated by the memoranda submitted to the Joint Parliamentary Committee by several Landholders' Associations asking for the special protection of their vested interests in landed property through a declaration of Fundamental Rights, even though it has been throughout recognized that in the interests not merely of their tenants but also of the country as a whole that the permanent revenue settlement required a radical change. The memorandum, for instance, of the Orissa Landholders' Association contains the following: 'A set of fundamental rights of federal citizenship, applicable at least to British

India, should be embodied in the Constitution Act. Such rights should include the safe-guarding of the vested interests of the Landholders or at least contain a provision that the permanent settlement will, on no account, be reversed.' Behind the demand for fundamental rights there is always a feeling either of fear or of hope—fear that the new government that will be established may interfere with rights, hope that it may be utilized for promoting social welfare. It is the fear that with the transfer of power from the hands of the British into the hands of the people of the country, the privileges which they hitherto enjoyed may disappear that made landholders in different parts of the country put forward claims like these. Such a claim really amounts to an abuse of the doctrine. It was not to uphold but to destroy privilege that the doctrine has been put forward. *Privilege is not identical with right.*

The landholders were not alone in doing this. The British mercantile community domiciled in India claimed special protection for their interests. The members of the public services wanted security not merely for ' any rights provided or preserved for them by or under this Act ' but also for all their legitimate interests—a very vague expression. And it so happened, as will be seen below—that while the rights demanded by the working classes and the traditional rights found in all the constitutions of the eighteenth and nineteenth centuries were not incorporated in the Government of India Act of 1935, rights demanded by those who stood for vested interests found a place in it. This is due partly to a general doubt among English politicians as to the utility of abstract rights and more to the fact that the act was not framed by a body representative of the people most affected by it.

Those who were responsible for the framing of the Government of India Act of 1935 assigned the following among other reasons for not incorporating in it a comprehensive list of Fundamental Rights:

1. As Sir Samuel Hoare put it:

> ' It is so extraordinarily difficult to put in anything sufficiently explicit to make it [a fundamental right] susceptible of a legal decision, and without a legal decision the fundamental right is really only the expression of a pious opinion.'

In stating thus he was merely echoing the opinion

contained in the Report of the Simon Commission which ran as follows :

'We are aware that such provisions have been inserted in many constitutions, notably in those of the European states formed after the war. Experience, however, has not shown them to be of any great practical value. Abstract declarations are useless, unless there exists the will and the means to make them effective.'

2. Even when they are capable of being made sufficiently explicit their incorporation in the Constitution would lead to endless litigation. The same Simon Commission observe :

'Having regard especially to the ingenuity and persistence with which litigation is carried on in India, we should anticipate that an enactment of the kind would result in the transfer to the law courts of disputes which cannot be conveniently disposed of by such means. It has always to be remembered that, if a law court has jurisdiction to dispose of well-founded claims based on solid grounds, it is also bound to listen to farfetched complaints with no real substance behind them.'

(It should however be noted that litigiousness is not a characteristic vice of the people of India and that from the point of view of litigation it makes little difference whether rights are guaranteed by the constitution or by the ordinary law of the land. In either case recourse to courts is the means for securing the rights guaranteed.)

3. Any declaration of rights :

'Would impose an embarassing restriction on the powers of the legislature and prevent it from undertaking measures of a progressive character of which the country is really in need.'

4. There is a better way of safe-guarding the rights of minorities and of other special sections of the people.

It may be done through the Royal Proclamation inaugurating the new Constitution—as was done by the famous proclamation of Queen Victoria in 1858—and through the Instrument of Instructions to be issued by the Crown to the Governor-General and the provincial Governors. In some cases it may be laid down—as has actually been done by the Act of 1935 in respect of property rights in land—that no

legislation interfering with recognized rights should be undertaken without the previous consent of the Governor or the Governor-General as the case may be.

(The flaw however in this argument is that Proclamations have in practice proved to be of not much avail and that what we are considering at this stage is not the method by which rights can be made effective but what the rights themselves are.)

There is nothing new in the reasons put forward by the British authorities. They are the usual arguments that have been adduced by all critics of the doctrine. They have already been examined in the previous chapter and do not call for special remarks here. There are, however, one or two points arising out of the situation in India to which reference may be made.

One is that the authorities have not consistently adhered to their view that the fundamental rights cannot be made sufficiently explicit. For while this has been taken as an excuse for not incorporating in the Act of 1935 the traditional fundamental rights and the special rights claimed by the working classes, it has not prevented the inclusion of the rights of certain classes like the British commercial community, the minorities, and the members of the public services. In every one of these cases it has been found that an exact definition of the rights to be guaranteed is not desirable though possible. It is assumed that these classes of people have certain legitimate rights and interests and that they should be safe-guarded. Many of those who gave evidence before the Joint Parliamentary Committee pointed out how necessary it was to define exactly the scope of these legitimate rights. But it was left vague. In such a context nothing would have been lost if other 'rights' which had the attribute of vagueness were also incorporated into the Act. It would have produced a desirable psychological effect upon the masses of people in the country.

The other point is the machinery that has been devised to give effect to the legitimate rights of the groups referred to above. Special powers have been conferred on the Governor-General and the provincial Governors to do everything necessary to safe-guard them. This is a departure from the usual system under which, as in the United States, the Courts are made the guardians of rights.

This departure was defended on the ground that the Governor-General and the Governors were an impartial set of people and that they could be trusted to exercise their powers without any bias or prejudice. This is not a convincing argument, as heads of the executive are more under the influence of partisan considerations than judges in courts. Several witnesses pointed out that it would be inexpedient for the head of the executive to become mixed up in any such matter, that it would lead to conflicts between him on one side and his ministry and legislature on the other, that it would interfere with the smooth working of government, and that at least in the case of minorities and commercial interests it would be better to get relief through courts. Moreover, the use of courts for this purpose should have been regarded as inevitable sooner or later. For if the goal of constitutional development in India is the attainment of Dominion Status with the right of secession by her, the heads of executives would ultimately be reduced to the position of mere constitutional heads carrying out the advice of their cabinets. In such a situation there would be no meaning in their being the guardians of rights.

It may be incidentally noted that in safe-guarding the legitimate rights of these classes the Governor-General and the Governors are free to enact any law, pass any ordinance, incur any expenditure, and undertake any administrative action which they may deem necessary. Reference has already been made to the criticism that when courts are given power to enforce rights, they become really a legislative body. But under the Government of India Act of 1935 there is no limit not only to the legislative but also to the financial and administrative powers that the Governor-General and the Governors can exercise in the discharge of their special responsibilities towards these classes.

The net result of all this controversy was that no comprehensive list of Fundamental Rights was included in the Act of 1935, although a publicist like Sir Tej Bahadur Sapru tried to impress on the Joint Parliamentary Committee that :

> 'in the peculiar circumstances of India, and particularly with a view to give a sense of security to the Minorities and the Depressed Classes, it is necessary that too much emphasis should not be laid on the

orthodox British legal point of view, regarding Fundamental Rights, but that some of them should find a place in the statute itself.'

There are only two sections in the Act that have any analogy to a declaration of Rights. Section 298 says :

'No subject of His Majesty domiciled in India shall on grounds only of religion, place of birth, descent, colour, or any of them be ineligible for office under the Crown in India, or be prohibited on any such grounds from acquiring, holding, or disposing of property or carrying on any occupation, trade, business, or profession in British India.'

The latter part of the section is subject, however, to a proviso which deprives it of much of its utility. Section 299 states :

'No person shall be deprived of his property in British India save by authority of law.'

There is nothing surprising in the refusal of the British authorities to include in the Act a charter of the rights of man and of workers and peasants. Every constitution has for its primary object the safe-guarding of the rights of those who have a real share in enacting it. Every other object is of subsidiary importance. If one knows the nature of the parties to the framing of a constitution one can say what it will be like, whose rights it will protect, and what machinery will be utilized for the purpose. The Act of 1935 is primarily the work of the British Parliament. To some extent the Muslim minority and the Indian Princes were able to influence it. The masses of the people of India and the parties that could have spoken on their behalf were not a real force in shaping it. The Act therefore embodies principles and programmes which appeared to be of significance from the point of view of the British in the main ; and it would be unnatural to look for a list of the Fundamental Rights of Man and of the working classes in it.

But if at any time a really democratic constitution comes to be framed for the country it is bound to contain, like all the constitutions of recent times, a Declaration of Fundamental Rights. All important parties and organizations in the country—the Congress, the Muslim League, the Hindu Mahasabha, the Trade Unions and the workers and peasants—are in favour of such a course. And in such a case a list of rights modelled on those

included in the resolution passed by the Indian National Congress in 1933 may be taken as a basis. The list framed by the Congress is brief, concise, and includes everything that deserves to be included.

APPENDIX

The Congress Resolution on Fundamental Rights

The Congress is of opinion that to enable the masses to appreciate what 'Swaraj' as conceived by the Congress will mean to them, it is desirable to state the position of the Congress in a manner easily understood by them. In order to end the exploitation of the masses, political freedom must include real economic freedom of the starving millions. The Congress, therefore, declares that any constitution which may be agreed to on its behalf should provide, or enable the Swaraj Government to provide for the following:

FUNDAMENTAL RIGHTS AND DUTIES

(1) *i.* Every citizen of India has the right of free expression of opinion, the right of free association and combination, and the right to assemble peacefully and without arms, for purposes not opposed to law or morality.

ii. Every citizen shall enjoy freedom of conscience and the right freely to profess and practise his religion, subject to public order and morality.

iii. The culture, language and script of the minorities and of the different linguistic areas shall be protected.

iv. All citizens are equal before the law, irrespective of religion, caste, creed, or sex.

v. No disability attaches to any citizen, by reason of his or her religion, caste, creed, or sex, in regard to public employment, office of power or honour, and in the exercise of any trade or calling.

vi. All citizens have equal rights and duties in regard to wells, tanks, roads, schools and places of public resort, maintained out of State or local funds, or dedicated by private persons for the use of the general public.

vii. Every citizen has the right to keep and bear arms, in accordance with regulations and reservations made in that behalf.

viii. No person shall be deprived of his liberty nor shall his dwelling or property be entered, sequestered, or confiscated, save in accordance with law.

ix. The State shall observe neutrality in regard to all religions.

x. The franchise shall be on the basis of universal adult suffrage.

xi. The State shall provide for free and compulsory primary education.

xii. The State shall confer no titles.

xiii. There shall be no capital punishment.

xiv. Every citizen is free to move throughout India and to stay and settle in any part thereof, to acquire property and to follow any trade or calling, and to be treated equally with regard to legal prosecution or protection in all parts of India.

Labour

2. (*a*) The organization of economic life must conform to the principle of justice, to the end that it may secure a decent standard of living.
   (*b*) The State shall safe-guard the interests of industrial workers and shall secure for them, by suitable legislation and in other ways, a living wage, healthy conditions of work, limited hours of labour, suitable machinery for the settlement of disputes between employers and workmen, and protection against the economic consequences of old age, sickness, and unemployment.
3. Labour to be freed from serfdom and conditions bordering on serfdom.
4. Protection of women workers, and specially, adequate provision for leave during maternity period.
5. Children of school-going age shall not be employed in mines and factories.
6. Peasants and workers shall have the right to form unions to protect their interests.

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